

BANK BUMIPUTRA MALAYSIA BHD.

v.

KUMPULAN JISS SDN. BHD. & 3 ORS.

HIGH COURT, KUALA LUMPUR
DATO' SHAIK DAUD BIN HJ MOHD
ISMAIL J.

[CIVIL SUIT NO: D1-23-1445-88]

10 JUNE 1994

BANKING: Guarantee - Overdraft facilities extended to first defendant - Third defendant executing letter of guarantee after facility granted to first defendant - Whether third defendant liable for monies drawn down before execution of guarantee - Whether consideration furnished is past consideration.

PRACTICE & PROCEDURE: Order 18 r. 19 RHC - Application to strike out statement of defence - Plaintiff extending overdraft facility to first defendant - Third defendant executing letter of guarantee subsequent to drawdown of overdraft facility by first defendant - Third defendant raising issue of past consideration - Whether any triable issues.

This was an application by the plaintiff bank to strike out the statement of defence of the third defendant under O. 18 r. 19(a), (c) and (d) of the Rules of the High Court 1980.

The plaintiff bank in this suit claimed against the third defendant, as guarantor, the outstanding sum due on an overdraft facility extended to the first defendant.

The third defendant entered his defence claiming triable issues, the main contentions being with regard to breach of the terms of the letter of offer and that the plaintiff bank had already granted an overdraft facility to the first defendant prior to the third defendant executing the letter of guarantee thus rendering the consideration past consideration.

Held:

[1] It is trite law that in an application of this nature, the Courts would only exercise its power to strike out a claim or defence in plain and obvious cases. It is also trite law that where there is even one triable issue, the defendant ought to be allowed to defend the plaintiff's claim.

[2] There is evidence supporting the third defendant's contention that the guarantee was executed subsequent to the overdraft being

a drawn down. The third defendant's contentions that he should not be saddled with any money owing before the signing of the guarantee is evidenced by the lack of such a provision in the guarantee itself.

b [3] The defendant's liability is based on the letter of guarantee which depends on the letter of offer of the facility. Under the terms for interest the rate is stated at 10% per annum with no mention of monthly rest. Therefore the repayment terms claimed by the plaintiff on monthly rest is not in compliance with the terms of the offer. Furthermore, the plaintiff does not deny the defendant's contention that the proceeds of the end financing was paid directly to the purchasers of the units instead of being credited to the first defendant's bridging account as agreed by the parties. The plaintiff also concedes that there was an increase in the rate of interest but failed to give an explanation for it.

d [4] The third defendant has succeeded in showing that there are triable issues and therefore this is not such a plain and obvious case for the defence to be struck out.

e [Plaintiff's application dismissed with costs].

Cases referred to:

Low Yat v. G.C. Grace [1947] 13 MLJ 115 (**foli**)
Bandar Builder Sdn. Bhd. & Ors. v. United Malayan Banking Corporation Bhd. [1993] 2 SCR 638 (**foli**)
Perwira Habib Bank Bhd v. MET Sdn. Bhd [1988] 2 CLJ 480 (**dist**)

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Legislations referred to:

Rules of the High Court 1980, O. 18 r. 19(a), (c) & (d)

For the plaintiff - Izhar Ismail; M/s Skrine & Co.

For the 3rd defendant - M. Teh; M/s Cheah Teh & Su

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JUDGMENT

Shaik Daud Bin Hj Mohd Ismail J:

By this summons in chambers plaintiff applies for the defence of defendant 3 to be struck out under O. 18 r. 19(a), (c) and (d) Rules of the High Court 1980. It is trite law that in an application of this nature the Court would only exercise its powers to strike out a claim or defence in plain and obvious cases. There are no dearth of authorities on this dating as far back as 1947 (See *Low Yat v. G. C. Grace* [1947] 13 MLJ 115) and down to the latest decision of the Supreme Court in *Bandar Builder Sdn. Bhd. and Others v. United Malayan Banking Corporation Bhd.* [1993] 2 SCR 638 where it

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was emphasised that the Courts will act only in plain and obvious cases.

Plaintiff's claim against the third defendant is as a guarantor to loan facilities provided by the plaintiff to the first defendant. The facility was for an amount of RM600,000 to the 1st defendant as the principal borrower but the actual amount now due is RM191,432.57. Third defendant has not denied that he executed a letter of guarantee in favour of the plaintiff but he now says that there are some triable issues and as such this is not such a plain and obvious case for his defence to be struck out. It is also trite law that when the defendant satisfies the Court that there is even one triable issue, he ought to be allowed to defend the plaintiff's claim.

Learned Counsel for the third defendant submits that there are at least three issues. Firstly that the consideration is a past consideration. The plaintiff apparently had already granted an overdraft facility to first defendant prior to the third defendant executing the letter of guarantee. This is evidenced in the statement of account produced by the plaintiff which shows that as at 9 January 1978 there was a balance of RM15,916.57 in debt. The third defendant executed the letter of guarantee on 21 January 1978. Question is whether third defendant would be liable for moneys drawn down by first defendant in respect of earlier facility. In the letter of guarantee dated 21 January 1978 third defendant guaranteed to pay on demand RM600,000 or any part of the money. Therefore he contends that he should not be saddled with any money owing before the signing of the guarantee unless it is provided for in the guarantee. There is in fact no such provision in the guarantee. Therefore this case can be distinguished with the case of *Perwira Habib Bank Bhd. v. MET Sdn. Bhd.* [1988] 2 CLJ 480 where the guarantee therein speaks of continuing advances where the defendant there agreed to repay all moneys due.

Secondly it is submitted that the terms for the facility is set out in detail in the letter of offer to the first defendant. Under the heading of interest it is merely stated that the rate of interest shall be 10% per annum. No mention is made of monthly rest. Therefore the repayment terms is not carried out by the plaintiff when their claim for interest is on a monthly rest basis. This is also an issue which has to be

a tried. Defendant's liability is based on the letter of guarantee which depends on the letter of offer of the facility. The third defendant in his amended statement of defence avers that he was at all material time assured by the plaintiff that all proceeds of the end financing will be credited to the first defendant's bridging finance account thereby ensuring that the entire bridging finance facility will be repaid from the end financing. Third defendant says that this repayments terms were not carried out by the plaintiff as they paid direct to the buyers of the units. This averment is not denied by the plaintiff.

c Thirdly the third defendant alleges that there was an increase in the rate of interest and this is conceded to by plaintiff but no explanation is put forth.

d I am satisfied that the third defendant has succeeded in showing that there are triable issues and therefore this is not such a plain and obvious case for the defence to be struck out under O. 18 r. 19. Therefore plaintiff's application is dismissed with costs.

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